

OFFICE OF SPECIAL MASTERS

No. 02-15V

(Filed: November 1, 2002)

TAMMY J. BROWN, DPM, RPH, *

*

Petitioner, *

*

(To be published)

v. *

*

SECRETARY OF HEALTH AND *

HUMAN SERVICES, *

*

Respondent. *

*

DECISION

HASTINGS, Special Master

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter the "Program"--see 42 U.S.C. § 300aa-10 et seq.)¹. For the reasons stated below, I conclude that the case must be dismissed because the petition was not timely filed.

I

BACKGROUND

A. Factual Allegations

On January 7, 2002, the petitioner, Tammy J. Brown, filed the instant petition, alleging that she was injured by a Hepatitis B vaccination that she received on December 15, 1995. Petitioner alleges that she experienced the initial symptoms of a left eye vision disturbance on January 4, 1996, which persisted for approximately three months. She asserts that identical symptoms recurred four

¹The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 et seq. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.).

years later in January 2000, leading to a diagnosis of optic neuritis of the left eye, and that complete vision loss in the left eye occurred in March 2000. Petitioner further alleges that her loss of vision in the left eye was caused by her Hepatitis B vaccination of December 15, 1995.

B. Applicable Statutory Provisions

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the statute. The statutory deadlines for filing Program petitions are provided at § 300aa-16. With respect to vaccinations administered after October 1, 1988, as was the vaccination at issue here, § 300aa-16(a)(2) provides that a Program petition must be filed within 36 months of the onset of the first symptom of the injury.²

C. Procedural History

Respondent argued in a “Motion to Dismiss” filed on April 9, 2002, that petitioner in this case is time-barred from filing this petition, pursuant to § 300aa-16(a)(2). Respondent also contended that the doctrine of “equitable tolling” could not be applied to extend the statute of limitations in this case.

On April 12, 2002, I filed an Order deferring any ruling upon respondent’s “Motion to Dismiss” for an indefinite period of time, pending the resolution of proposals before Congress to change the limitations period for Vaccine Act cases. On May 24, 2002, however, in light of the Chief Special Master’s decision in *Chaconis v. HHS*, No. 98-165V (Fed. Cl. Spec. Mstr. Apr. 8, 2002), I filed an Order indicating that I would consider the timeliness issue again, and invited petitioner to file further briefing on the timeliness issue. Petitioner has declined to submit further briefing. It is appropriate at this time that I make a ruling upon the dismissal motion.

²See § 300aa-16(a)(2) (“In the case of... a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.”)

II

DISCUSSION

A. *The Issue*

As noted above, § 300aa-16(a)(2) requires that a Program petition with respect to a vaccination that was administered after October 1, 1988, must be filed within 36 months after the occurrence of the first symptom of the alleged injury. In this case, the vaccination in question was administered on December 15, 1995, and petitioner alleges that the first symptoms of her injury occurred on January 4, 1996. Therefore, the statutory 36-month period after the onset of symptoms expired on January 4, 1999. However, petitioner's petition for Program compensation was not filed until January 7, 2002. Thus, under a straightforward application of § 300aa-16(a)(2), this petition is time-barred.

B. *Applicability of the "Equitable Tolling" Doctrine*

The decision by the U.S. Court of Appeals for the Federal Circuit in *Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), provides a binding precedent concerning the application of the "equitable tolling" doctrine to Program cases. *Brice* holds that "equitable tolling is inconsistent with the existing statutory scheme." *Id.* at 1374. *Brice* makes clear that the Vaccine Act's three-year limitation on filing petitions is a strict rule, and this court is without power to extend the filing period. On November 26, 2001, the U.S. Supreme Court denied a petition for a writ of *certiorari* in that case, thus making the Federal Circuit holding final. *Cert. denied sub nom. Brice v. Thompson*, ___ U.S. ___, 122 S.Ct. 614 (2001). Thus, it is indisputable that the doctrine of equitable tolling may not be applied to extend the filing deadline in this case. Therefore, the petition must be dismissed because it was not timely filed.

III

CONCLUSION

The loss of vision suffered by Tammy J. Brown was obviously a tragic occurrence. Congress, however, was explicit in its language as to when petitions under the Program must be filed. In Ms. Brown's case, the deadline set by Congress was 36 months following the onset of her

symptoms. Because this petition was not filed within that time period, this petition must be dismissed as untimely.

George L. Hastings, Jr.
Special Master